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Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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SEP 27 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Petition of Cox Virginia Telcom, Inc.	)	
Pursuant to Section 252(e)(5) of the	)	CC Docket No. 00-249
Communications Act for Preemption	)	
of the Jurisdiction of the Virginia	)	
State Corporation Commission	)	
Regarding Interconnection Disputes	)	
with Verizon-Virginia, Inc. and	)	
for Arbitration	)	

REPLY TO VERIZON'S OPPOSITION TO COX'S MOTION TO STRIKE

Verizon's Opposition to Cox's Motion to Strike (the Opposition") does not justify introduction of the Munsell Declaration or any of the new claims presented in its Petition for Clarification and Reconsideration (the "Petition"). Indeed, much of the Opposition does not try to justify Verizon's late submissions, but is devoted to Verizon's substantive claims regarding Issue I-6. Rather than defend its tardy submissions, Verizon behaves as if they are submitted as of right. They are not. The Commission's rules require parties to make a considerable showing to support an exception to the general rule against submitting new evidence on reconsideration. Verizon has not done so. Consequently, Cox's Motion to Strike (the "Motion") must be granted.

First, Verizon's Opposition mentions only Cox's objections to the Munsell Declaration and ignores Cox's objections to Verizon's new claims and contract language. With no support, these claims should be struck for the reasons described in the Motion. Second, Cox cited no less than six independent reasons why the Commission should strike the Munsell Declaration from the record. Verizon ignored two of these objections, relying on its assertion that the Munsell Declaration merely supplements evidence introduced at the hearing. Cox's unanswered

objections provide more than sufficient basis to strike the Munsell Declaration. Even if they did not, Verizon's assertion that the Munsell Declaration is merely cumulative actually supports Cox's position, because in that case the evidence is not specifically necessary and Cox would endure substantial prejudice if it is admitted.

Without an explanation for the lateness of its evidentiary and other submissions, and without justification for the acceptance of the Munsell Declaration, Verizon is reduced to using rhetoric and conclusory statements to support its position. Consequently, the Commission should grant the Motion and strike Verizon's new matter from this proceeding.

I. Verizon Does Not Respond to Important Cox Objections to Its New Claims and Contract Language, So Verizon's Positions Should Be Deemed Abandoned.

In the Motion, Cox objected to Verizon's attempt to introduce new contract language for Issue I-6 through its Petition.[1] Verizon does not even attempt to defend this proposal – made nearly nine months after the parties were directed to make their final offers in the arbitration.[2] Given Verizon's failure to justify its attempted hit-and-run submission, the Commission should deem Verizon's position on this point to be abandoned.

Similarly, Cox objected to Verizon's introduction of new objections to Cox-proposed contract language on network architecture issues.[3] Again, Verizon has not explained its failure to raise these objections at some appropriate earlier point in this proceeding. Considering that Cox's contract language has remained nearly unchanged and has remained unchallenged

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[1] Motion at 7-8.

[2] Verizon says that during the hearing it "proposed" a traffic study for which the new contract language is necessary. Opposition at 2 & n.6. As described below, there never was such a proposal. *See infra*, n.11. Verizon manufactured that proposal for its brief out of the vague testimony of Steven Pitterle. *See* Tr. at 1813-15. Tellingly, Verizon actually cites its brief, rather than Mr. Pitterle's testimony, concerning this "proposal." *See* Opposition at n.6. That is because nothing in the testimony so much as hints that any proposal is being made. Consequently Verizon has no basis for introducing its contract language.

[3] Motion at 8.

throughout this proceeding, Verizon's failure to explain its delay should lead the Commission to strike or ignore these new objections.

II. Verizon Has Offered No Justification for Introduction of the Munsell Declaration.

Verizon ignored several of Cox's objections to the Munsell Declaration and failed to adequately answer the rest. Consequently the Munsell Declaration must be struck.

First, Verizon again failed to provide any information demonstrating that William Munsell is qualified to offer the declaration. This is critical because the Munsell Declaration offers no indication that Mr. Munsell has any expertise in addressing virtual foreign exchange traffic issues.[4] Consequently, the Munsell Declaration must be dismissed because Verizon has failed to show that Mr. Munsell is competent to offer evidence on this issue.

Verizon also has failed to address the shortcomings of the Munsell Declaration that render it irrelevant. For example, the Munsell Declaration and Verizon's Opposition contain no information regarding any traffic study that would accurately determine the end-to-end points of virtual foreign exchange calls exchanged between Cox and Verizon.[5] Verizon's assertion that the Munsell Declaration "shows" that a study of *traditional* foreign exchange traffic could adequately predict the end-to-end points of *virtual* foreign exchange traffic is totally unsupported. All the Munsell Declaration shows is that Verizon may be able to estimate amounts of traditional foreign exchange traffic. This is quite different from proposing a means of determining the end-to-end points of virtual foreign exchange calls.

The Opposition also does not attempt to explain how the type of study described in the Munsell Declaration could determine (or even estimate) traffic generated by non-virtual foreign

[4] *See* Motion at 6.

[5] *See* Motion at 5-6.

exchange calls that could cross local calling areas (including leaky PBX calls, forwarded calls, calls to off-premises extensions, etc.).[6] This is critical because Verizon's entire argument is predicated on the need for determining the actual end-to-end points of each call exchanged between Verizon and Cox, but no evidence in the record suggests that the end-to-end points of all calls can be established reliably.[7] The Munsell Declaration does not remedy this evidentiary deficiency.[8] Verizon does not address these shortcomings or explain why the Munsell Declaration is relevant even though it does not address these forms of traffic.

Moreover, Verizon's hearing testimony indicated that, as of October, Verizon was unaware of any way to measure the end-to-end points of virtual foreign exchange traffic.[9] Verizon's brief and Opposition mischaracterize Verizon's testimony as a "proposal" to do a traffic study of virtual foreign exchange traffic, and Verizon now claims that the Munsell Declaration is merely a supplement to this "proposal," showing that such a study could be

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[6] *See* Motion at 5-6.

[7] *See* Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration; In the Matter of Petition of Cox Virginia Telcom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc. and for Arbitration; In the Matter of Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc., *Memorandum Opinion and Order*, CC Docket Nos. 00-219, 00-249, 00-251, DA 02-1731, ¶¶ 301-303 (Wireline Comp. Bur.) (rel. July 17, 2002) (the "*Arbitration Order*").

[8] As described in the Motion, the Munsell Declaration would not be appropriate even if it did eliminate this evidentiary shortcoming. The Commission's rules are not intended to allow losing parties to improve their case by supplementing the record in a Petition for Reconsideration with evidence they easily could have produced during the main proceeding. *See* Motion to Strike at 3-4 (citing Barbour County Board of Education, *Memorandum Opinion and Order*, 12 FCC Rcd 11782, 11784 (1997); Marks CableVision and TCI CableVision of California, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 814, 818, 819-20 (2000) (citing Colorado Radio Corp. v. FCC, 118 F. 2d 24, 26 (D.C. Cir. 1941) (a litigant "[cannot] sit back and hope that a decision will be in its favor and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.")).

[9] *See* Tr. at 1811-15.

conducted.[10] Even a brief review of this testimony, however, reveals that no such proposal was made.[11] In sum, even if Verizon is right that the Munsell Declaration is merely cumulative evidence, Verizon now supports its hearing testimony that a relevant traffic study might be hypothetically possible with a declaration that says that such a study is hypothetically possible. Because, however, the Munsell Declaration is offered to demonstrate the feasibility of measuring the end-to-end points of virtual foreign exchange traffic, it plainly is irrelevant.

Verizon fares no better even where it has attempted to address Cox's objections. First, Verizon misunderstands the requirements of Section 1.106 of the Commission's rules.[12] Although the rules allow new evidence to be introduced with petitions for reconsideration in certain prescribed conditions, the party offering the new evidence must show that those conditions have been met. It is not enough to say, as Verizon does, that the evidence came into being after the hearings and admission is within some undefined public interest. The admission of new evidence through a petition for reconsideration is extraordinary, not routine, and parties do not have a right to have such evidence admitted.[13] Indeed, the Commission routinely denies

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[10] *See* Opposition at 2 & n.6.

[11] The "proposal" to which Verizon apparently refers is in the following exchange:

> MS. PREISS: Mr. Pitterle, are you aware of any mechanism by which a party, an originating carrier or terminating carrier can determine what the actual end points of the call are?
>
> MR. PITTERLE: I believe the mechanism would be vaguely aware, to answer your question. There may be a method by which the parties could do a traffic study for a period of time or share information so that they could develop a factor to apply to extract traffic. But there is nothing specific that I'm aware of—

Tr. at 1813.

[12] 47 C.F.R. § 1.106.

[13] *See e.g.* Petition for Reconsideration of the Request for Review of the Decision of the Universal Service Administrator by Maine School Administrative District No. 49, Fairfield, Maine, *Order*, 17 FCC Rcd 3550, 2552-53 (Com. Carr. Bur. 2002); Federal-State Joint Board on Universal Service, *Order on Reconsideration*, 17 FCC Rcd 3518, 3521 (Com. Carr. Bur. 2002).

admission of newly-proffered data that could have been developed and submitted before reconsideration.[14]

As Cox explained in the Motion, while the Commission's rules allow parties to proffer information that has developed after close of the hearing, they do not allow a party to bypass the main proceeding by waiting until the hearing is complete to develop evidence.[15] Consequently, Verizon's assertion that the information on which it now relies was not developed specifically for this proceeding is of no avail.

Verizon's assertions actually strengthen the case for excluding the Munsell Declaration. Although Verizon developed the traffic study cited in the Munsell Declaration after the hearings concluded, Verizon easily could have developed this evidence prior to the hearings and introduced it then. Nothing prevented Verizon from performing the traffic study to which Mr. Munsell alludes from the day that Cox submitted its petition for arbitration, which laid out the argument that the end-to-end points of calls cannot be reliably measured.[16] Thus, Verizon was on notice that virtual foreign exchange traffic was at issue in this proceeding and was responsible for marshalling its evidence in a timely fashion. Mr. Munsell's traffic study did not magically appear; Verizon produced it – too late for this proceeding – and nothing prevented Verizon from undertaking the study in mid-2001, rather than February, 2002.

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[14] *See, e.g.,* Federal-State Joint Board on Universal Service: Petitions for Reconsideration of Western Wireless Corporation's Designation as an Eligible Telecommunications Carrier in the State of Wyoming, *Order on Reconsideration*, 16 FCC Rcd 19144, 19151 (2001) (denying admission for data concerning number of customers, service areas, and investment because they were "facts that were known, or, through the exercise of diligence, could have been known or presented prior to the adoption" of original order); Educational Information Corp., *Memorandum Opinion and Order*, 13 FCC Rcd 23746, 23747-48 (1998) (holding that engineering study that could have been prepared at an earlier point in the proceeding "does not fall within the narrow range of facts that may be properly raised on reconsideration of a Commission action").

[15] *See* Motion to Strike at 3-4.

[16] *See* Petition for Arbitration of Cox Virginia Telcom, Inc, CC Docket No. 00-249, filed April 23, 2001, at 16.

Cox was entitled to rely on Verizon's virtual foreign exchange hearing testimony in formulating its arguments, and Verizon was required to make its best case based on the evidence it could produce. That Verizon had within its control, but failed to present, additional evidence that it now believes would have helped its case is no reason to admit the evidence. The new evidence rule is meant to allow the Commission to take notice of information that has come to light after a hearing has concluded, not to allow parties to fill in the gaps in their case revealed by an adverse decision.[17]

Likewise, Verizon does not meet the showing required to allow the introduction of new evidence under the public interest standard of Rule 1.106. It is not enough to state that the public interest requires the acceptance of new evidence. Rather, Verizon must show clearly how the public interest requires admission of its proffered new evidence. Verizon still has not identified a legitimate public interest that will be served by the introduction of the Munsell Declaration. Verizon's assertion that the public interest is served by the Commission's adherence to its own precedent is a tautology, but it provides no basis for acceptance of the Munsell Declaration.[18] Verizon's argument supposes that the Commission ignored precedent in adopting Cox's language for issue I-6, but that argument goes to the merits of Issue I-6, not to the admissability of the Munsell Declaration, and does nothing to support Verizon's argument.[19]

Similarly, Verizon's argument that it could not have introduced the Munsell Declaration sooner under the Commission's rules is remarkable. Indeed, Verizon introduced considerable

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[17] *See* Payne of Virginia, Inc., *Memorandum Opinion and Order*, 66 F.C.C.2d 633, 637 (1977).

[18] *See* Opposition at 4-5.

[19] Verizon's argument that, if it can just change the facts, the Bureau will be willing to follow the law simply does not add up. In particular, Verizon's legal arguments do not depend on this factual claim. Petition at 15-23. In any event, Cox demonstrates in its Opposition to Verizon's Petition that the Bureau's decision on Issue I-6 was consistent with both the facts and the law.

new matter in submissions made three months ago, just one week before the *Arbitration Order* was released.[20] Verizon also did not object to other parties' post-hearing submissions as violating any Commission rules. Thus, Verizon's argument cannot be taken seriously.

Verizon also misses the point of Cox's due process argument. Although Verizon is correct that the Commission's rules permit it to introduce new evidence under certain prescribed circumstances, potential prejudice to Cox must be a part of the public interest analysis upon which Verizon relies so heavily. Cox is entitled to its due process rights to confront and cross-examine Verizon's witnesses, and this right should be compromised only in the most compelling situations.[21] This plainly is not one of those cases.

IV. Despite Verizon's Protests, Sanctions Are Entirely Appropriate to Maintain the Order and Fairness of This Proceeding.

Rather than showing why the Commission should consider the Munsell Declaration and its other submissions, Verizon spends much of its time rearguing the merits of Issue I-6. This has been Verizon's pattern throughout this proceeding. It consistently has attempted to obscure the point at hand by muddying the waters with late submissions and new proposals. In essence, Verizon has given Cox the choice of using its time and resources to object to these improper offerings or suffering the consequences of having the staff believe that Cox has acquiesced to them. To protect its rights, Cox has chosen to answer Verizon's submissions and to point out their nonconformity to the Commission's rules. As this proceeding draws to a close, the Commission should consider the extra resources that Verizon's flouting of the Commission's

[20] *See* Letter from Kelly L. Faglioni, counsel for Verizon, to Mr. Jeffrey Dygert, Assistant Bureau Chief, Common Carrier Bureau, Federal Communications Commission, dated July 10, 2002.

[21] *See* Motion at 7.

procedures has cost both the Commission and the parties. The Commission should call Verizon to account for this behavior by imposing sanctions.

IV. Conclusion

For these reasons, Cox hereby respectfully requests that its Motion to Strike be granted;that the Commission strike from the record in this proceeding the Munsell Declaration and all other new matter contained in Verizon's Petition for Reconsideration; and that Verizon be assessed sanctions in light of its continuous and systematic evasion of the Commission's rules.

Respectfully submitted,

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September 27, 2002

I, Tammi A. Foxwell, a legal secretary at Dow, Lohnes & Albertson, PLLC do hereby certify that on this 27th day of September, 2002, copies of the foregoing Reply of Cox Virginia Telcom, Inc. were served as follows:

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